FILE COPY

SUPREME COURT, U.S.
FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 974

BANK VOOR HANDEL EN SCHEEPVAART N.V.,

Petitioner,

v.

ROBERT F. KENNEDY, Attorney General of the United States, and Peter Campbell Brown, Acting Director, Office of Alien Property, United States Department of Justice,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert L. Wagman
500 Fifth Avenue
New York 36, New York

Lawrence C. Moore
Moore & Hansell
Washington 6, D. C.

Attorneys for Petitioner

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS RELIED ON FOR THE GRANTING OF THE WRIT	7
1. If the lower courts' interpretation of § 9(a) is correct, the Trading With the Enemy Act violates the due process and just compensation guarantees of the United States Constitution, Fifth Amendment	8
2. The Trading With the Enemy Act, fairly construed, does not permanently disqualify petitioners, solely by reason of their Netherlands nationality during World War II, from judicial remedy under § 9(a) of the Act	10
3. The decision below is inconsistent with the mutual obligations of the United States and the Netherlands as a matter of treaty and international law	12
CONCLUSION	14
APPENDIX	15
1. Opinion of the Court of Appeals for the District of Columbia Circuit	15

PAGE

2. Judgment of the Court of Appeals for the District of Columbia Circuit 18

3. United States Constitution:
   Art. 1, Sec. 8, Cl. 11 19
   Fifth Amendment 20

4. Trading With the Enemy Act, 40 Stat. 11 (1917), as amended, 50 U. S. C. App. §1 *et seq.*:
   Section 9(a) 20
   Section 2 21
   Section 5 22
   Section 7(c) 22
   Section 32 22

5. Treaty of Friendship, Commerce and Navigation, between the United States and the Netherlands, 8 U. S. T. 2043, T. I. A. S. 3942 24

CITATIONS

Cases:

Bank Voor Handel En Scheepvaart N.V. v. *Administrator of Hungarian Property* [1954] A.C. 584, affirming *Bank Voor Handel* v. *Slatford* [1953] 1 Q.B. 248 7

Becker Steel Co. v. *Cummings*, 296 U. S. 74 (1935) 8, 9, 14

Clark v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947) 9, 11, 12, 13

Guessefeldt v. *McGrath*, 342 U. S. 308 (1952) 9, 12

H. P. Drewry v. *Onassis*, 188 Misc. 912, 69 N. Y. S. 2d 850 (Sup. Ct. N. Y. Co., 1947), aff'd 272 App. Div. 870, 72 N. Y. S. 2d 262 (1st Dept., 1947), motion for leave to appeal denied, 72 N. Y. S. 2d 680 (1947) 11

PAGE

Miller v. *United States*, 78 U. S. (11 Wall.) 268 (1870) 10

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287 (1920) 9

Russian Volunteer Fleet v. *U. S.*, 282 U. S. 481 (1931) 9

Schilling v. *Rogers*, 363 U. S. 666 (1960) 9

Silesian-American Corp. v. *Clark*, 332 U. S. 469 (1947) 9

Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. *Rogers*, 357 U. S. 197 (1958) 9

Standard Oil Co. v. *Clark*, 163 F. 2d 917 (2d Cir. 1947), cert. den. 333 U. S. 873 (1948) 13

State Corporation Commission of Kansas v. *Wichita Gas Co.*, 290 U. S. 561 (1934) 9

Stoehr v. *Wallace*, 255 U. S. 239 (1921) 9, 11

V/O Sovfracht v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* [1943] A. C. 203 10

Constitution, Statutes and Rules:

U. S. Constitution

Art. 1, Sec. 8, Cl. 11 ..... 3, 11, 19

Fifth Amendment 3, 6, 8, 20

Trading With the Enemy Act, 40 Stat. 11 (1917), as amended, 50 U. S. C. App. §1 *et seq.*

Section 2 ..... 3, 4, 10, 21

Section 5 ..... 3, 4, 22

Section 7(c) 3, 4, 9, 22

Section 9(a) 3, 4, 5, 7, 8, 9, 10, 11, 13, 20

Section 32(a) 3, 5, 22

PAGE

Act of June 25, 1948, ch. 646, 62 Stat. 928, 28 U. S. C. §1254(1) 2

Act of June 25, 1948, ch. 646, 62 Stat. 929, as amended, 28 U. S. C. §1291 6

Act of July 11, 1919, 41 Stat. 35 12

Act of June 5, 1920, 41 Stat. 977 12

Act of March 8, 1946, 60 Stat. 50 12

Rule 54(b), Federal Rules of Civil Procedure 6

Treaty:

Treaty of Friendship, Commerce and Navigation, between the United States and the Netherlands, 8 U. S. T. 2043, T. I. A. S. 3942 ..... 4, 12, 24

Art. V. Par. 1 ..... 4, 13, 24

Art. VI. Par. 4 ..... 4, 13, 24

Art. VI. Par. 5 ..... 4, 13, 24

Treatise:

1 Oppenheim, International Law, 688 (8th ed. Lauterpacht, 1955) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

BANK VOOR HANDEL EN SCHEEPVAART, N.V. *et al.*,
Petitioners,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL of the UNITED STATES as SUCCESSOR to the ALIEN PROPERTY CUSTODIAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Your petitioners are four corporations of the Netherlands, namely, Bank Voor Handel En Scheepvaart N. V., N. V. Hollandsch-Amerikaansche Beleggings-Maatschappij (Holland-American Investment Corporation), N.V. Handelscompagnie Ruilverkeer, and N.V. Handels-En-Transport-Maatschappij "Vulcaan". The respondents are Robert F. Kennedy, Attorney General of the United States, as successor to the Alien Property Custodian, and Elizabeth R. Smith, Treasurer of the United States. Petitioners pray that a writ of certiorari be issued to review a judg-

ment of the United States Court of Appeals for the District of Columbia Circuit entered on February 23, 1961, affirming orders (JA* 48-51) of the District Court for the District of Columbia which dismissed, for lack of jurisdiction, the complaints of petitioners N.V. Hollandsch-Amerikaansche Beleggings-Maatschappij (Holland-American Investment Corporation), N.V. Handelscompagnie Ruilverkeer, and N.V. Handels-En-Transport-Maatschappij "Vulcaan", and struck, for lack of jurisdiction, certain claims from the complaint of petitioner Bank Voor Handel En Scheepvaart, N.V.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit (Appendix hereto, pp. 15-17) has not yet been reported. The District Court rendered no opinion.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on February 23, 1961. A copy thereof appears at pages 18, 19 of the Appendix hereto. The jurisdiction of this Court is invoked under Act of June 25, 1948, ch. 646, 62 Stat. 928, 28 U. S. C. § 1254 (1).

Questions Presented

The basic issue is whether petitioners, solely because they were corporations of the Netherlands when the Netherlands was occupied by German military forces during World War II, are permanently barred from any judicial

* Joint Appendix in the Court of Appeals.

remedy to recover their property seized by the Alien Property Custodian.

This issue presents three questions:

1. Does the Trading with the Enemy Act violate the due process and just compensation guarantees of the United States Constitution, Fifth Amendment, if the Act is construed to deny permanently to petitioners, solely because of their Netherlands nationality during World War II, any judicial hearing with respect to the taking and retention of their property without any compensation?

2. Does the Trading with the Enemy Act, properly construed, permanently disqualify petitioners, solely by reason of their Netherlands nationality during World War II, from any judicial remedy under § 9(a) of such Act for return of their vested property?

3. Under international law and the Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands, do petitioners, as Netherlands nationals, have the same standing after World War II as United States nationals have, to sue in the district court for return of vested property?

Constitutional Provisions, Treaties and Statutes Involved

The constitutional provisions, treaties and statutes here involved are:

1. U.S. Constitution, Fifth Amendment, and Article I, Sec. 8, Cl. 11.

2. Trading with the Enemy Act, 40 Stat. 411 (1917) as amended, 50 U.S.C. App. §§ 2, 5, 7(c), 9(a) and 32(a).

3. Treaty of Friendship, Commerce and Navigation with the Netherlands, effective December 5, 1957, Art. V, par. 1, Art. VI, pars. 4, 5, 8 U.S.T. 2043, T.I.A.S. 3492.

The relevant provisions of the foregoing are set forth at pages 19-24 of the Appendix hereto. We summarize the relevant provisions of the Trading with the Enemy Act (hereinafter sometimes called the "Act") as follows:

Section 5 of the Act grants broad powers to the President or his designee to vest property of any foreign country or "national thereof".

Section 9(a) of the Act pursuant to which these actions were brought, provides that any person "not an enemy or ally of enemy" may sue the Alien Property Custodian or the Treasurer of the United States in the United States District Court for the District of Columbia for the return of vested property and is entitled to return if he establishes his rights of ownership to the satisfaction of the Court.

Section 2 of the Act defines an "enemy", and includes in such definition

> "Any individual * * * resident within the territory (*including that occupied by the military and naval forces*) of any nation with which the United States is at war * * * and any corporation incorporated within such territory of any nation with which the United States is at war * * *" (Italics supplied.)

Section 7(c) of the Act provides that the sole remedy of any person claiming vested property shall be that provided by the Act.

Section 32(a), enacted in 1946 and thereafter expanded by amendment, authorizes the President or his designee, by administrative action, to return any vested property upon a determination that the claimant is not excluded, under prescribed conditions.

Statement of the Case

Petitioners are corporations organized under the law of the Netherlands. They include a commercial bank, shipping company and trading company, all of which existed and did business prior to the outbreak of World War II (JA 54). In 1942 the Alien Property Custodian vested petitioners' property having a value of over $4,000,000. (JA 3, 10, 16, 22).

In 1949, petitioners brought separate actions in the United States District Court for the District of Columbia for the return of their vested property. Jurisdiction of that Court rested on §9(a) of the Trading with the Enemy Act. Although the Court of Appeals in its opinion (Appendix hereto, p. 16) stated that the complaints herein were filed after petitioners failed to recover their property in an administrative proceeding, it is clear that the complaints herein were filed in 1949 long before conclusion of the administrative proceeding and that defendants' time to answer the complaints was by stipulation extended until sixty days after final disposition of the claims on an administrative basis (JA 25-28).

Each of the complaints (JA 2-25) alleges in substance that the plaintiff is a Netherlands corporation, that its property has been vested by the defendants, that plaintiff is not an enemy or ally of an enemy within the meaning of the Trading with the Enemy Act, that it never engaged in activities inimical to the United States and never acted as a cloak for an enemy, that a notice of claim for return

of its property was duly filed, that notwithstanding plaintiff's eligibility for return of its property the defendants have refused return and that plaintiff has been deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The four actions here involved were consolidated for trial with two other similar actions, one by another Netherlands corporation and the other by a Swiss foundation (JA 46). Thereafter, the defendants moved to dismiss the complaints of the five Netherlands corporations (omitting the Swiss foundation) on the ground that the Court lacked jurisdiction of the subject matter of such actions solely because the Netherlands plaintiffs "were at all material times corporations incorporated in the Netherlands while the Netherlands were occupied by Germany and Germany was at war with the United States in the Second World War" (JA 47, 48).

Defendants withdrew so much of their motion as related to claims to return of property vested after the liberation of the Netherlands (JA 54). Thus, the motion was completely withdrawn as to one defendant, became a motion to strike some of the claims of petitioner Bank Voor Handel En Scheepvaart N.V. and continued as a motion to dismiss the entire complaints of the other three petitioners (JA 54).

The District Court granted the defendants' motion to dismiss without opinion. The appellate jurisdiction of the Court of Appeals was invoked under Act of June 25, 1948, ch. 646, §2, 28 Stat. 929, as amended, U. S. C. §1291, and Rule 54(b) of the Federal Rules of Civil Procedure.

According to the vesting orders, the property was vested in 1942 on the basis that the Alien Property Custodian had found that the property was owned or controlled by nationals of designated enemy countries, namely

Germany and or Hungary, and had further determined that to the extent such nationals were not in such designated enemy countries the national interest of the United States required that they be treated as nationals of such designated enemy countries (JA 55-62). Petitioners' property was not vested, as the Court of Appeals said in its opinion (Appendix hereto, p. 16) "Because their country was occupied by the enemy".

By these actions petitioners seek an opportunity to establish to a Court that in fact they were never owned or controlled by an enemy within the meaning of §9(a). The rulings below deny such opportunity to be heard on the merits, not because of the alleged German or Hungarian nationality on the basis of which their property was vested as set forth in the vesting orders, but solely because of Netherlands nationality.

The English Courts have found that petitioner Bank Voor Handel En Scheepvaart N.V. was not an "enemy" for purposes of return of property under the British Trading with the Enemy Act. *Bank Voor Handel En Scheepvaart N.V. v. Administrator of Hungarian Property* [1954] A. C. 584, affirming *Bank Voor Handel En Scheepvaart N.V. v. Slatford* [1953] 1 Q. B. 248.

The Government of the Kingdom of the Netherlands, through its Ambassador, appeared in each court below as *amicus curiae* in support of petitioners' position that Netherlands nationality is not "enemy" nationality within the meaning of §9(a) of the Act for purposes of peacetime return of vested property.

Reasons Relied on for the Granting of the Writ

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The issue of law here presented has not been squarely raised or decided in any prior case and is far reaching in impact. Domestically, it is of fundamental importance to the proper administration of the Trading With the Enemy Act. Internationally, it raises serious questions as to the mutual protection to be afforded property rights of Netherlands (and other friendly) nationals and United States nationals in the territory of the other.

1. If the lower courts' interpretation of § 9(a) is correct, the Trading With the Enemy Act violates the due process and just compensation guarantees of the United States Constitution, Fifth Amendment.

Section 9(a) was included in the Act to avoid unlawful confiscation and thereby to insure the Act's constitutionality. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79 (1935). Although the Court below did not discuss the point, it tacitly accepted defendants' argument that petitioners can have no constitutional rights since they are enemies by definition and since the Constitution does not protect enemies. There is no basis in reason or precedent for holding that an "enemy" solely by reason of occupation is the equivalent of a true enemy insofar as the protection of the Fifth Amendment is concerned.

To sustain the judgment of the lower Court it appears that one of two untenable propositions must be sanctioned. Either it must be decided that petitioners, solely by reason of their existence as corporations organized under Netherlands law, are not entitled to the protection of the United States Constitution, or it must be decided that although petitioners, as nationals of a friendly foreign country are entitled to the protection of the United States Constitution, the Constitution fails to guarantee them the right to a judicial hearing concerning the seizure of their property. The first alternative is in conflict with the cases

holding that nationals of Russia and Switzerland are entitled to the protection of the United States Constitution. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931); *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (1947); *Societe Internationale Pour Participation Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958). The second alternative is in conflict with the cases holding that one entitled to the protection of the Constitution is entitled to a judicial hearing under §9(a) of the Act with respect to seized property. *Stochr* v. *Wallace*, 255 U.S. 239 (1921); *Becker Steel Co.* v. *Cummings*, 296 U.S. 74 (1935); *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952); *Societe Internationale Pour Participation Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958); cf. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287 (1920); *State Corporation Commission of Kansas* v. *Wichita Gas Co.*, 290 U.S. 561 (1934). Not only is such choice of alternatives not compelled, but a fair reading of the Trading with the Enemy Act, such as this Court has prescribed in *Clark* v. *Uebersee Finanz Korporation*, 332 U.S. 480 (1947) and *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), must result in the conclusion that nationals of friendly but enemy-occupied states are not, and were not intended by Congress to be, denied permanently the right to a judicial hearing with respect to administrative confiscatory action pursuant to war powers. The only judicial remedy available lies in original suit under §9(a), since there is no right to judicial review of an administrative refusal to return (*Schilling* v. *Rogers*, 363 U. S. 666 (1960)), and since §7(c) of the Act provides that the sole remedy of any person claiming vested property is that provided by the Act.

2. The Trading With the Enemy Act, fairly construed, does not permanently disqualify petitioners, solely by reason of their Netherlands nationality during World War II, from judicial remedy under § 9(a) of the Act.

There is no basis for inferring that Congress ever intended that after the liberation of his country a national of our wartime ally should continue because of his nationality to bear the burdens of "enemy" classification. This is clear when the intent of Congress is related to the purpose underlying the inclusion of a national of a wartime ally in the §2 definition of "enemy".

The purpose of such inclusion in §2 is to make it more difficult for the true enemy to further his war effort by exercising control over assets belonging to nationals of friendly but occupied countries. Such inclusion is based on the traditional principle that seizure is warranted of "any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner". See *Miller* v. *United States*, 78 U. S. (11 Wall.) 268, 306 (1870). The House of Lords has stated of similar English legislation that a Netherlands subject is "deemed to be an enemy • • • while the occupation continues" and "The reason is that, while the occupation lasts, they are on the wrong side of the line of hostile demarcation". See *V/O Sovfracht* v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* [1943] A.C. 203, 219, 230.

Once property of a Netherlands national ceased in 1945 to be subject to true enemy control all reason ceased for continuing to regard the owner of such property as "enemy" solely by reason of Netherlands nationality.

In an analogous situation involving the right of a French national to sue on a private contract, the New York courts expressly distinguished between the French national's status during the war and his status after the war, and ruled that after liberation a French national "was no longer an enemy within the meaning of the Trading with the Enemy Act". See *H. P. Drewry* v. *Onassis*, 188 Misc. 912, 913, 69 N. Y. S. 2d 850, 851 (Sup. Ct. N. Y. Co., 1947), aff'd 272 App. Div. 870, 72 N. Y. S. 2d 262 (1st Dept. 1947), motion for leave to appeal denied, 72 N. Y. S. 2d 680.

The Act, which is "strictly a war measure and finds its sanction in the constitutional provision, Art. I, §8, cl. 11, empowering Congress 'to declare war, grant letters of marque and reprisal, and makes rules concerning captures on land and water'" (*Stoehr* v. *Wallace*, 255 U.S. 239, 242 (1921)), should not be interpreted in such a way as to produce a result not legitimately related to the constitutional war powers granted to Congress. Although the war powers clause may justify the vesting in wartime of property owned by a national of an allied but enemy-occupied country, the permanent confiscation in peacetime of such property solely because of Netherlands nationality, is totally unrelated to any legitimate aim of war or of peacetime settlement. This Court has found "not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis". See *Clark* v. *Uebersee Finanz-Körporation*, 332 U. S. 480, 487 (1947).

A national of Switzerland, a wartime neutral, and even a German national resident in Hawaii, is entitled to a judicial hearing under §9(a) as to whether he is in fact

an enemy. *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947); *Guessefeldt* v. *McGrath*, 342 U. S. 308 (1952). Congress could not have intended discrimination against a national of the Netherlands, a wartime ally, solely by reason of nationality.

The history of the Act shows that the situation of the "technical enemy"—one who fits the definition of enemy because of temporary occupation of his country by forces of the real enemy—was considered after both World War I and World War II, and that amendments to the Act were passed to clarify the authority of the Alien Property Custodian to make summary *administrative* returns to technical enemies and others, including persecuted persons. Act of July 11, 1919, 41 Stat. 35; Act of June 5, 1920, 41 Stat. 977; Act of March 8, 1946, 60 Stat. 50, adding §32(a) to the Trading With the Enemy Act, 50 U.S.C. App. §32(a). Because of these amendments and because generally the Alien Property Custodian in carrying out voluntary administrative returns acted in a manner as to distinguish between real and technical enemies, the courts have not been called on until now to pass on the issue here involved. These amendments dealing with administrative returns were never intended to affect the judicial remedy for return which was part of the Act when originally passed in 1917.

3. The decision below is inconsistent with the mutual obligations of the United States and the Netherlands as a matter of treaty and international law.

Effective December 5, 1957, the United States and the Netherlands entered into a Treaty of Friendship, Commerce and Navigation, reaffirming the rights and obligations of each country to the other. 8 U.S.T. 2043, T.I.A.S. 3942.

Article V, Paragraph 1 of the treaty (Appendix hereto, p. 24) affirms the right of each party to "national treatment with respect to access to the courts of justice" of the other party. A United States corporation, regardless of possible activity in an enemy country, has the right to bring suit under §9(a) to recover its property. See *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 925 (2d Cir. 1947), *cert. den.* 333 U. S. 873 (1948). Thus, the treaty principle requiring "national treatment with respect to access to the courts of justice" can be given effect in our situation only if §9(a) is open to Netherlands corporations as it is to United States corporations. Apart from the treaty, it is a fundamental principle of international law that in peace time "every State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned." 1 Oppenheim, International Law, 688 (8th ed. Lauterpacht, 1955).

Moreover, Paragraph 4 of Article VI of the treaty (Appendix hereto, p. 24) provides that Netherlands property shall not be taken in the United States except for a public interest and only with "prompt payment of just compensation". As to these "just compensation" benefits, Paragraph 5 of such Article VI (Appendix hereto, p. 24) provides that Netherlands nationals shall receive not only "national treatment" but also "most-favored-nation treatment". Since a Swiss corporation is accorded judicial remedy under §9(a) (*Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947)), it is contrary to the "most-favored-nation treatment" principle of the treaty to deny equal judicial benefit to a Netherlands corporation simply by reason of being incorporated in the Netherlands.

Conclusion

Instead of construing §9(a) broadly "to give effect to its remedial purpose" (*Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 80 (1935)), the courts below have given §9(a) a narrow and inflexible interpretation which for the first time determines that Netherlands nationality is "enemy" in time of peace. Grave doubts as to the constitutionality of the Act are thereby raised, unnecessarily so. Nothing in the text of the Act requires such interpretation. On the contrary, a fair reading of the Act, particularly in terms of its purpose, compels the conclusion that Congress never intended to make the nationality of allies, after cessation of German occupation, a bar to judicial remedy for recovery of property seized in wartime pursuant to war powers. Moreover, due regard for treaty principles and international law requires that the judicial remedy open under §9(a) to nationals of the United States and of wartime neutral countries should also be available to Netherlands nationals.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. AUGENBLICK,
500 Fifth Avenue,
New York 36, N. Y.

LAWRENCE C. MOORE,
Mills Building,
Washington 6, D. C.,
Attorneys for Petitioners.

May 1961.

APPENDIX

1. Opinion of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15932

BANK VOOR HANDEL EN SCHEEPVAART, N.V., APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

No. 15933

N.V. HOLLANDSCH-AMERIKAANSCHE BELEGGINGS-MAATSCHAPPIJ
(Holland-American Investment Corporation)
APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

No. 15934

N.V. HANDELSCOMPAGNIE RUILVERKEER, APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

No. 15935

N.V. HANDELS-EN-TRANSPORT-MAATSCHAPPIJ, "VULCAAN", APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided February 23, 1961

Mr. Robert L. Augenblick, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Lawrence C. Moore* was on the brief, for appellants.

Mr. Arthur R. Schor, Attorney, Department of Justice, with whom *Miss M. Magdalena Schoch*, Attorney, Department of Justice, was on the brief, for appellees.

Mr. Walter A. Slowinski filed a brief on behalf of J. H. van Roijen, Ambassador Plenipoteniary, Kingdom of the Netherlands, as *amicus curiae*, urging reversal.

Before EDGERTON, PRETTYMAN and FAHY, *Circuit Judges*.

PER CURIAM: Because their country was occupied by the enemy, property of appellant Netherlands corporations was vested during World War II under §5 of the Trading with the Enemy Act. 40 STAT. 411, 415, as amended, 50 U.S.C. App. §5. After failing to recover the property in an administrative proceeding, appellants filed complaints demanding its return. The District Court dismissed the complaints for lack of jurisdiction.

By §9(a) of the Trading with the Enemy Act "any person not an enemy or ally of enemy" who claims an interest in vested property and fails to recover it by administrative action may sue to establish his claim. By §2 of the Act "enemy" means "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

This definition covers appellants and therefore §9(a) gives them no right to sue. "The only express provision in the Trading with the Enemy Act for recourse to the courts by those claiming the return of property vested during World War II is that contained in §9(a)." *Schilling* v. *Rogers*, 363 U. S. 666, 671. Here, as in *Schilling*, no implied provision covers the case. By §7(c) of the Act the sole remedy of any person claiming vested property is "that provided by the terms of this Act." This is a suit against the United States to which the United States has not consented.

The treaty of 1957 between the Netherlands and the United States assures Netherlands nationals full access to United States courts but does not waive sovereign immunity, mention the Trading with the Enemy Act, or create causes of action which Congress has refused to create.

Affirmed.

2. Judgment of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM—1960

Civil 1942-49

No. 15,932

BANK VOOR HANDEL EN SCHEEPVAART, N.V., APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Civil 1941-49

No. 15,933

N.V. HOLLANDSCH-AMERIKAANSCHE BELEGGINGS-MAATSCHAPPIJ
(Holland-American Investment Corporation)
APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Civil 1938-49

No. 15934.

N.V. HANDELSCOMPAGNIE RUILVERKEER, APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Civil 1937-49

No. 15935

N.V. HANDELS-EN-TRANSPORT-MAATSCHAPPIJ, "VULCAAN", APPELLANT

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

Before: Edgerton, Prettyman, and Fahy, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court appealed from in these cases are affirmed.

Per Curiam.

Dated: February 23, 1961.

3. United States Constitution

Art. 1, Sec. 8, Cl. 11

The Congress shall have Power • • • To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Fifth Amendment

No person shall be held * * * nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. Trading With the Enemy Act, 40 Stat. 411 et seq., as amended, 50 U. S. C. App. §1 et. seq.

Section 9

"§9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled * * * If the President shall not so order within sixty days after the filing of such application or if the claimant shall have

filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled • • •"

Section 2

"§2. Definitions

"The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act [section 1-6 and 7-39 of this Appendix]—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory • • •"

Section 5

"* * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President * * *"

Section 7(c)

"* * * The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed * * * to the Alien Property Custodian * * * or seized by him shall be that provided by the terms of this Act * * *"

Section 32

"§32. Return of property—(a) Conditions precedent

"The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, * * *

(2) that such owner, and legal representative or successor in interest, if any, are not—

(A) the Government of Germany, Japan, Bulgaria, Hungary, or Roumania; or

(B) a corporation or association organized under the laws of such nation; * * * or

(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of Italy or of any nation with which the United States has not at any time since December 7, 1941, been at war: Provided, That an individual who, while in the territory of a nation with which the United States has at any time since December 7, 1941, been at war, was deprived of life or substantially deprived of liberty pursuant to any law, decree, or regulation of such nation discriminating against political, racial, or religious groups, shall not be deemed to have voluntarily resided in such territory; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Roumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946], was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: Provided, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: * * * or

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under

subdivisions (A), (B), (C), or (D) hereof: Provided, That notwithstanding the provisions of this subdivision (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section [March 8, 1946] • • •"

5. Treaty of "Friendship, Commerce and Navigation" between United States and the Netherlands, effective December 5, 1957, 8 U.S.T. 2043, T.I.A.S. 3942

Article V, Par. 1

"1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. • • •"

Article VI, Pars. 4 and 5

"4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public interest, nor shall it be taken without the prompt payment of just compensation • • •"

"5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. • • •"

F

Supreme Court of the United States

TABLE OF CONTENTS

	PAGE
STATEMENT	1
THE INTEREST OF THE *Amicus Curiae*	2
REASONS FOR GRANTING THE WRIT	3
1. The definition of enemy accepted by the court below runs counter to internationally accepted notions of enemy status and alliance	3
2. The definition of enemy accepted by the court below results in discrimination because of nationality	5
3. The definition of enemy accepted by the court below in effect subjects all property of enemy occupied states to seizure and retention by administrative fiat	8
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

Anderson v. *N. V. Transandine Handelmaatschappij*, 289 N. Y. 9, 43 N. E. 2d 502 (1942)	4
Becker Steel Co. of America v. *Cummings*, 296 U. S. 74 (1935)	7
Clark v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480 (1947)	5, 6
Schilling v. *Rogers*, 363 U. S. 666 (1960)	7

PAGE

Société Internationale Pour Participations Industrielles et Commerciales, S. A. v. *Rogers*, 357 U. S. 197 (1958) 6

Sovfracht (V/O) v. *Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A. C. 203 4

Standard Oil Co. v. *Clark*, 163 F. 2d 917 (2d Cir. 1947), cert. denied, 333 U. S. 873 (1948) 5

Stoehr v. *Wallace*, 255 U. S. 239 (1921) 7

Zalcmanis v. *United States*, 173 F. Supp. 355 (Ct. Cl. 1959), cert. denied, 362 U. S. 917 (1960) 7

TREATY AND STATUTE

Trading With The Enemy Act, 40 Stat. 411 (1917), 50 U. S. C. App. 1 et seq. 3, 5, 7

Sec. 9(a) 7

Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956 [1957], 8 U. S. T. & O. I. A. 2043, T. I. A. S. 3942 ..... 5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BANK VOOR HANDEL EN SCHEEPVAART, N.V., et al.,
Petitioners,

—against—

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, and ELIZABETH R. SMITH, Treasurer of the United States,
Respondents.

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF J. H. VAN ROIJEN, *AMICUS CURIAE*

STATEMENT

This case arose as the result of seizure and refusal to return by the United States Alien Property Custodian and his successor, the Attorney General, of assets in the United States belonging to petitioners. The petitioners, four Netherlands corporations, have sought to challenge in the United States courts the right of the said United States officials to seize and retain their property, but have been turned back thus far "because," in the words of the Court of Appeals, "their country was occupied by the enemy

[Germany]." The details of the litigation are adequately stated in the petition for writ of certiorari filed on behalf of petitioners. In short, petitioners seek to establish that they are not disqualified solely because of Netherlands nationality from access to the courts of the United States on the issue of confiscation of their property.

THE INTEREST OF THE *AMICUS CURIAE*

In filing the present memorandum in support of the petition for certiorari, the Netherlands Government is fulfilling one of its traditional functions, supporting the interests of its nationals engaged in business abroad. The petitioners here have for over forty years been important members of the Netherlands business community, and continue to be active in banking, shipping, and heavy industry in the Netherlands. Petitioners are, however, well represented by counsel, and were this case limited to a single claim, however large or meritorious, the Netherlands Government would not feel compelled to take the extraordinary step of appearing as *amicus curiae* in a United States court.

The present case, in the view of the Netherlands Government, has implications beyond those of a single claim, and the urgency of having these implications recognized, and of correcting the result of the lower court's decision before it becomes a precedent, has caused the Netherlands Government to seek to place its views directly before this Court.

1. The effect of the decision below is that any Netherlands national, whether a natural or juristic person, is treated as an enemy 15 years after the close of hostilities.

2. The effect of the decision below is that a corporation organized in the Netherlands is treated differently in the courts of the United States from a corporation organized

in the United States, and indeed from a corporation organized, for example, in Switzerland.

3. The effect of the decision below is that Netherlands nationals can be deprived of their property by administrative fiat, not just temporarily in an emergency, but permanently.

It requires no elaboration to see that the Netherlands, proud of its reputation as a guardian of private property and foreign investments, anxious to uphold its alliance with the United States against criticism both at home and abroad, and constant in its opposition to Hitler Germany and all other forms of totalitarianism, has a strong interest in correcting the decision in this case. The Netherlands Government is hopeful that the necessary review and correction of the decision in this case can be accomplished by this Court, without further proceedings on an international level.

REASONS FOR GRANTING THE WRIT

Without addressing itself to the questions of statutory, constitutional, and international law discussed in the petition for certiorari filed on behalf of the petitioners, this memorandum seeks only to indicate the kind of argument to be made against the results mentioned above.

1. The Definition of Enemy Accepted by the Court Below Runs Counter to Internationally Accepted Notions of Enemy Status and Alliance.

The court below read the definition of enemy in the Trading with the Enemy Act to include for all time one who was in territory even temporarily occupied by the forces of the enemy. While such definition of enemy may well have been justified for purposes of vesting or block-

ing assets in time of war, as a permanent definition it runs counter to any intelligent distinction between victim of occupation and real enemy.

The common struggle of the Netherlands with the United States against the German and Japanese enemy requires no documentation here. It may be noted however that two eminent courts, the British House of Lords and the New York Court of Appeals, had occasion even while hostilities were in progress to speak of the status of the Netherlands. The House of Lords, in 1943, spoke of

> a natural repugnance to describing as enemies of this country those loyal and patriotic subjects of Holland who have had the misfortune to be forced to reside there after the German occupation. . .
>
> *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A. C. 203, 218.

While the court was compelled to agree that during wartime a Netherlands corporation was barred under the British Trading with the Enemy Act from suing in the British courts, the court made it clear that this disability, and this enemy status, lasted only as long as the occupation by the enemy:

> The reason is that, while the occupation lasts, they [plaintiffs] are on the wrong side of the line of hostile demarcation . . . (*Id.* at 230).

The New York Court of Appeals, in 1942, upheld emergency wartime legislation of the Netherlands on the basis that the "enemy [of the Netherlands] is now our enemy," and that legislation of the Netherlands is "part of the law of a friendly foreign State." *Anderson* v. *N. V. Transandine Handelmaatschappij*, 289 N. Y. 9, 19, 43 N. E. 2d 502, 506, 507 (1942).

When the Netherlands and the United States concluded their Treaty of Friendship, Commerce and Navigation in 1957, based, as is said in the Preamble, on the desire of the two countries to strengthen "the bonds of peace and friendship traditionally existing between them," it surely occurred to no one that being a national of one of the parties could have the effect in the law of the other party of endowing such national with the status of enemy. Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956 [1957], 8 U. S. T. & O. I. A. 2043, T. I. A. S. 3942.

It is not contended, of course, that Netherlands nationality is conclusive assurance that a person or corporation is not an enemy. All of the allied nations have had the experience with the various devices used by Germany and Japan to "cloak" their activities in the garb of neutral or allied nationality. See *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 484-85 (1947). The contention is simply that Netherlands nationality or incorporation cannot be the one factor giving to an alien in the United States the status of enemy.

2. The Definition of Enemy Accepted by the Court Below Results in Discrimination Because of Nationality.

It is clear that a corporation organized in one of the States of the United States may bring an action in the courts under the Trading with the Enemy Act to challenge a determination by the Alien Property Custodian that it is an enemy within the meaning of the Act on account of doing business with the enemy. *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 925 (2d Cir. 1947), cert. denied, 333 U. S. 873 (1948). Similarly, it is clear that a corporation organized in Switzerland may bring an action in the courts under the Trading with the Enemy Act to challenge a

determination by the Alien Property Custodian that it is an enemy within the meaning of the Act. *E.g., Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480 (1947); *Société Internationale Pour Participations Industrielles et Commerciales, S. A.* [*Interhandel*], v. *Rogers*, 357 U. S. 197 (1958). Indeed in this very case, one of the members of the Bank voor Handel en Scheepvaart group, owned by the same beneficial owners and operated by the same management as petitioners, has been permitted to maintain suit (Civ. Action No. 1939-49, D. D. C.), because the country under whose laws it was created is not the Netherlands. Only the Netherlands companies have been barred from suit, and, according to the judgment below, solely because their country was occupied by the enemy during World War II.

The court below has stated that the Treaty of 1957 between the Netherlands and the United States assures Netherlands nationals full access to United States courts. This is clear from Article V(1) of the Treaty, reading as follows:

> Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.
>
> Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956 [1957], 8 U. S. T. & O. I. A. 2043, T. I. A. S. 3942.

But if access to courts and national treatment are to mean only that Netherlands nationals are privileged to be told in

court that their nationality disqualifies them from receiving a hearing on the merits, the protection afforded by the Treaty, and indeed by international law in general, is reduced to mockery.

The court below stated that the Treaty of 1957 makes no reference to the Trading with the Enemy Act, does not waive sovereign immunity, and creates no new causes of action. But if discrimination is to be guarded against by treaty, it is obvious that no single statute passed by one treaty partner—whether before or after the treaty—can undo the general renunciation of discrimination by both parties. As for sovereign immunity, the United States has already consented, in § 9(a) of the Trading with the Enemy Act, to be sued for claims arising from seizures of property by the Alien Property Custodian, and all that petitioners assert is that this consent must under the Treaty apply to them as it does to United States nationals. See *Zalcmanis* v. *United States*, 173 F. Supp. 355 (Ct. Cl. 1959), cert. denied, 362 U. S. 917 (1960). As for the creation of new causes of action, petitioners have sought no other remedy than that provided by the Trading with the Enemy Act. *Cf. Schilling* v. *Rogers*, 363 U. S. 666 (1960). They contend simply that they are entitled to the same rights as are, and must be, granted to United States nationals under § 9(a) of the Trading with the Enemy Act. See *Stoehr* v. *Wallace*, 255 U. S. 239 (1921); *Becker Steel Co. of America* v. *Cummings*, 296 U. S. 74 (1935). If petitioners are excluded from these rights because they are corporations organized in the Netherlands, they are the victims of unlawful discrimination according to nationality.

3. The Definition of Enemy Accepted by the Court Below in Effect Subjects All Property of Enemy Occupied States to Seizure and Retention by Administrative Fiat.

As a result of the decision below in the present case, no national of a country occupied by the enemy in time of war can feel secure against arbitrary seizure and retention of its property in the United States. According to the decision below, any assets of Netherlands banks or insurance companies, or any Netherlands flag merchant ship, could have been seized by the United States enemy property authorities, and if the owner of such property had been a resident or national of the Netherlands during 1940-1945, or had been a corporation organized under Netherlands law, the only remedy of such owner would have been to appeal for voluntary return to the same Alien Property Custodian (or his successor) who had authorized the seizure of the property. It is plain that this prospect, never before thought of, must in view of the present world situation have an unsettling effect both on Netherlands commercial interests contemplating investment in the United States and on foreign commercial interests contemplating business relations with Netherlands enterprises.

CONCLUSION

The decision below is an important decision in the history of enemy property law. It cannot be allowed to stand as a precedent. The decision defines the word enemy to confuse oppressed and oppressor and to undermine the basis of alliance. It discriminates without real reason between nationals of the United States and neutral nations, and nationals of occupied nations, in violation of international law and treaty. Finally, the decision below undermines the security of foreign private property and invest-

ment, which has been one of the cornerstones of United States law and policy.

For the reasons stated, the petition for writ of certiorari in this case should be granted.

Respectfully submitted,

HENRY P. DE VRIES
Attorney for J. H. VAN ROIJEN
Ambassador Plenipotentiary,
Kingdom of the Netherlands
Amicus Curiae

ANDREAS F. LOWENFELD
Of Counsel

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 9 1961
JAMES R. BROWNING, Clerk

No. 958

In the Supreme Court of the United States

OCTOBER TERM, 1960

BANK VOOR HANDEL EN SCHEEPVAART, N.V., ET AL.,
PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
PAUL V. MYRON,
Acting Director, Office of Alien Property,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
ARTHUR R. SCHOR,
M. MAGDALENA SCHOCH,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Reasons for denying the writ	3
Conclusion	2
Appendix A	12
Appendix B	13

CITATIONS

Cases:

Bank voor Handel en Scheepvaart N.V. v. *Slatford, and Another*, 1 Q.B. 248	7
Benito Estenger, The, 176 U.S. 568	5
Cities Service Co. v. *McGrath*, 342 U.S. 330	8
Clark v. *Uebersee Finanz-Korporation*, 332 U.S. 480	6, 7
Daimler Co. Ltd. v. *Continental Tyre and Rubber Co.*, 2 A.C. 307 (1916)	7
Farmers' Loan & Trust Co. v. *Hicks*, 9 F. 2d 848 (C.A. 2), certiorari denied, 269 U.S. 583	6
Feyerabend v. *McGrath*, 189 F. 2d 694	5
Guessefeldt v. *McGrath*, 342 U.S. 308	7
Juragua Iron Co. v. *United States*, 212 U.S. 297	5
Kaufman v. *Societe Internationale, etc.*, 343 U.S. 156	10
Maiorano v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268	9
McGrath v. *Zander*, 177 F. 2d 649	8
Miller v. *United States*, 11 Wall. 268	5

Cases—Continued Page

Russian Volunteer Fleet v. *United States*, 282 U.S. 481 8

Schilling v. *Rogers*, 363 U.S. 666 11

Silesian-American Corp. v. *Clark*, 332 U.S. 469 8

Societe Internationale, etc. v. *Rogers*, 357 U.S. 197 10

Society for the Propagation of the Gospel v. *Wheeler*, Fed. Cas. No. 13,156 5

Soriano v. *United States*, 332 U.S. 270 8

Swiss Insurance Co. v. *Miller*, 267 U.S. 42 6

United States v. *Krepper*, 159 F. 2d 958, certiorari denied, 330 U.S. 824 5

Venus, The, 8 Cranch 253 5

Constitution, Statute and Treaties:

U.S. Constitution, Fifth Amendment 8

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1 *et seq.*:

Section 2 ..... 4, 5, 6, 7, 8

Section 2(a) 5

Section 7(c) 6, 8

Section 9(a) 2, 3, 4, 6, 7, 8

Section 12 4

Section 32 ..... 3, 7

Section 33 11

Brussels Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets, 2 U.S.T. 731 10

Memorandum of Understanding between the United States and The Netherlands, 2 U.S.T. 1262 10

1957 Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands, 8 U.S.T. 2043 8

Article V 9

Article VI 9

Miscellaneous:

H Rep. 1269, 79th Cong., 1st Sess 7

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 958

BANK VOOR HANDEL EN SCHEEPVAART, N.V., ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. 15–17) is reported at 288 F. 2d 375.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 19) was entered on February 23, 1961. The petition for a writ of certiorari was filed on May 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court properly dismissed, for lack of jurisdiction, a suit brought under Section 9(a) of the Trading with the Enemy Act for the return of property vested during World War II, where it appeared without dispute that petitioners, Netherlands corporations, were resident and doing business within enemy-occupied territory (occupied Holland) when the property was seized.

STATUTE INVOLVED

Pertinent portions of relevant sections of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1 *et seq.* (including Sections 2, 7(c), 9(a) and 32) are reprinted in the appendix to the petition (pp. 20–24). We have set forth, in addition (App. A, *infra*, p. 12) the first paragraph of Section 7(c) and a portion of Section 12.

STATEMENT

Since this case turns solely upon the jurisdiction of the District Court to entertain petitioners' suit, the facts may be summarily stated:

Petitioners are Netherlands corporations whose property was vested by the Alien Property Custodian during the German occupation of Holland (Pet. App. 16). The instant suit for return of the seized property was filed in June 1949, pursuant to the provision of Section 9(a) of the Trading with the Enemy Act. The complaint (J.A. 2–8) alleged that petitioners were not "enemies" within the meaning of the statute and were accordingly entitled to a return. The case was held in abeyance, however, pending disposition of an

administrative claim for return of vested property which had been previously filed with the Custodian under Section 32 of the statute (see J.A. 25–28).

The administrative claim was disallowed by a decision of the Custodian [1] entered on February 13, 1959. His decision (reprinted in App. B, *infra*, pp. 13–38), based exclusively on exhibits of undisputed authenticity and a stipulation of facts, found that petitioners were beneficially owned by a Hungarian national residing in Switzerland, Baron Heinrich Thyssen-Bornemisza; that Thyssen-Bornemisza, acting through an agent, was engaged in extensive wartime business operations in Germany; and that petitioners were enemy-tainted because of the enemy character of their owner.

Following completion of the administrative proceedings, the government moved in the District Court to dismiss the pending Section 9 suit on the ground that petitioners were "at all material times corporations incorporated in the Netherlands while the Netherlands were occupied by Germany and Germany was at war with the United States" (J.A. 47–48), and hence were "enemies" within the Act's definition. The District Court granted the motion to dismiss (J.A. 48–51) and the Court of Appeals affirmed *per curiam* (Pet. App. 16–17).

REASONS FOR DENYING THE WRIT

In holding that a remedy under Section 9(a) is not available to petitioners, the lower courts were plainly correct; the statutory language permits no

[1] The term "Custodian" is used to refer both to the Alien Property Custodian and to his successors.

other conclusion. Petitioners' constitutional argument, assuming *arguendo* that it may have merit, leads only to the conclusion that they should seek relief by a suit for just compensation in the Court of Claims—a remedy which they have not pursued. The question presented here, moreover, has no substantial importance at this late stage in the administration of alien property.

1. The statutory remedy conferred by Section 9(a) runs only to one not an "enemy" or "ally of enemy."[2] And "enemy" is defined in Section 2 as including, *inter alia,* (1) persons of any nationality resident "within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" and (2) corporations organized or doing business "within such territory." Petitioners are "enemies" under this definition. Indeed, even petitioners concede that this is so for purposes of the seizure of their property, but they contend that the meaning of "enemy" under Section 9 should be interpreted as according them a right to recover the property after occupation of the Netherlands had ceased.

The Act's definition, however, makes no distinction between those who are personally hostile and those who are sympathetic to the United States. Nor does it draw distinctions based upon nationality or citizenship.[3] The test is residence or incorporation within

[2] "Enemy" property shall be returned only "as Congress shall direct." Section 12.

[3] Indeed, the belligerent right to take property of those subject to enemy control has never been deemed limited to those who are personally hostile or who are affiliated by citizen-

enemy or enemy-occupied territory, and the property of an American citizen who is resident there is subject to confiscation no less than that of one who is both a national and resident of the territory. Section 2(a), it has been stated, "was intended to have specific application to any individual regardless of his nationality or citizenship and even if a citizen of the United States, if he was a resident within a territory of any nation with which the United States was at war." *United States* v. *Krepper*, 159 F. 2d 958, 966 (C.A. 3), certiorari denied, 330 U.S. 824. See, also, *Feyerabend* v. *McGrath*, 189 F. 2d 694 (C.A.D.C.).

It is significant that Congress had provided (Section 2) a single definition of "enemy" both for purposes of authorizing the Custodian to sequester

---

ship or nationality with the enemy country. In *Miller* v. *United States*, 11 Wall. 268, 305–306, this Court stated:

"* * * The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. * * *"

See, also, *The Benito Estenger*, 176 U.S. 568; *The Venus*, 8 Cranch 253; *Juragua Iron Co.* v. *United States*, 212 U.S. 297; *Society for the Propagation of the Gospel* v. *Wheeler*, Fed. Cas. No. 13,156.

property (section 7(c)) and for purposes of authorizing a suit for its return (section 9(a)).[4] This Court, moreover, has already rejected as an "impossible construction" the suggestion that enemy status might change as a result of the termination of war, stating that "The word 'enemy' * * * of course refers to the person who or corporation which fulfilled the definition of enemy during the war." *Swiss Insurance Co. v. Miller,* 267 U.S. 42, 45 (involving a Swiss corporation which did business with Germany prior to the seizure of its property and contended that it ceased to be an enemy when it thereupon terminated the conduct of such business or, alternatively, when the war ended). See, also, *Farmers' Loan & Trust Co.* v. *Hicks,* 9 F. 2d 848 (C.A. 2), certiorari denied, 269 U.S. 583. The same reasoning compels the rejection of petitioners' shifting construction.

Faced with unambiguous statutory provisions and a settled line of decisions applying these provisions in accordance with their plain term petitioners rely upon a constitutional objection. In substance, they contend that, although their property was subject to seizure for "protective" purposes, their connection with the enemy was forcibly imposed and, therefore, it would be unconstitutional for the United States to retain their property now that the threat of its utilization by the enemy is past. In other words, it is argued that those who are "technical enemies" (persons whose

[4] Sections 2, 7(c) and 9(a) were enacted as part of the original 1917 Act. The vesting power was expanded during World War II, but the right to sue for return was still barred to those who were Section 2 "enemies." See *Clark* v. *Uebersee Finanz-Korporation,* 332 U.S. 480.

only affiliation with the enemy is that they were incorporated within territory subsequently occupied by the enemy), rather than "real" enemies, have a constitutional right to the return of seized property or to just compensation for its loss. This right, petitioners contend, cannot be satisfied by a purely administrative remedy.[5]

Even if the administrative remedy which Congress has provided in Section 32 is constitutionally inadequate, the literal language of Section 9(a)—which bars "enemies" as defined in Section 2—cannot be judicially modified to permit suit by "technical enemies." This seems particularly clear when it is considered that Congress, in enacting Section 32 in 1946, explicitly recognized that the Trading with the Enemy Act denied "technical enemies" the right to file suit. As the relevant committee report stated (H. Rep. 1269, 79th Cong., 1st Sess., pp. 1–2), the new legislation authorizing administrative return to those who were merely "technical enemies" was adopted because "present law does not permit a return of the property of even these technical 'enemies'." And see *Guessefeldt*

---

[5] Petitioners, we note, make no effort to demonstrate that the detailed administrative determination made in their case lacks rational basis. They attach significance to the fact that property seized by Great Britain was returned to the same Netherlands corporation. See *Bank voor Handel en Scheepvaart N.V.* v. *Slatford and Another*, 1 Q.B. 248, 252 (1953). But this decision rests on the proposition that under English law the courts will not pierce the corporate veil in order to ascertain whether the beneficial owners are enemies. *Ibid; Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.*, 2 A.C. 307 (1916). The contrary is, of course, true under American law. *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480.

v. *McGrath*, 342 U.S. 308, 314–315, in which this Court observed, "Section 32 of the Trading with the Enemy Act * * * as * * * enacted after World War II, provided for administrative returns of property to certain classes of 'technical' enemies who were ineligible to bring suit under Section 9(a)." See, also, *McGrath* v. *Zander*, 177 F. 2d 649, 652 (C.A.D.C.). The statutory bar cannot possibly be characterized as inadvertent.

If, therefore, the statutory remedies, as applied to "technical enemies," are constitutionally inadequate, the conclusion to which one is forced is not that Section 9(a) may be rewritten so as to provide that which it in terms denies, but, rather, that petitioners are required to proceed in the Court of Claims by way of a suit for just compensation rested on the Fifth Amendment. See *Cities Service Co.* v. *McGrath*, 342 U.S. 330, 335; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479–480; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481.[6] This they have not done.[7]

2. Petitioners' position is not aided by reference to the 1957 Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands,

---

[6] If petitioners are correct in their view that a judicial remedy is constitutionally compelled, the "sole relief and remedy" language of Section 7(c) of the Trading with the Enemy Act does not bar the availability of judicial relief grounded upon the Fifth Amendment.

[7] We are not unmindful that petitioners may now be barred from proceeding in the Court of Claims by limitations. See *Soriano* v. *United States*, 352 U.S. 270. But the failure to pursue this avenue is one with which petitioners alone are chargeable, especially since it has long been settled that Section 9(a) is unavailable to one who falls within the Section 2 definition of "enemy."

8 U.S.T. 2043. The Court of Appeals observed (Pet. App. 17) that this treaty "assures Netherlands nationals full access to United States courts but does not waive sovereign immunity, mention the Trading With the Enemy Act, or create causes of action which Congress has refused to create."[8] Certainly, the concept of "access to the courts" in Article V of the Treaty (Pet. App. 24) does not create substantive rights for which the law of the forum makes no provision.[9] *Cf. Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 274. Moreover, petitioners are in no position to assert that they lack a "just compensation" remedy within Article VI (Pet. App. 24) when they have failed to pursue that remedy in the Court of Claims.

3. The issue raised by petitioners may fairly be described as residual; at this late date, it has no substantial importance in the administration of alien property. It is significant in this connection that the instant decision is one of first impression although the World War II vesting program is now twenty years old.

More than 18,000 so-called title claims (*i.e.*, claims for the return of vested property made by persons asserting ownership interests) were filed administratively in the aftermath of World War II. The Custodian has made final disposition of all except

[8] It might have added that there is no indication that the treaty was to have retroactive effect or to apply in any way to measures taken by the signatories during World War II.

[9] The protocol to Article V reads as follows (8 U.S.T. 2043, 2086):

"The term 'access' as used in Article V, paragraph 1, comprehends, among other things, legal aid, costfree access to the courts and exemption from security for costs."

approximately 700 of these claims. We note parenthetically that the administrative program conducted under Section 32 has resulted in the allowance of many hundreds of claims filed by the residents of enemy-occupied territory and that it has operated, with very rare exception, to the mutual satisfaction of this government and of the other governments jointly interested in the disposition of the external assets of Germany.[10]

Of the approximately 700 matters still pending administratively, most involve so-called "persecutee" claims filed by persons who were resident within enemy, as distinguished from enemy-occupied, territory.[11] As to the character of these claims, see *Schil-*

---

[10] See the Brussels Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets, 2 U.S.T. 731, and the Memorandum of Understanding between the United States and The Netherlands, 2 U.S.T. 1262.

[11] The figures given in this and in the preceding paragraph as to administrative claims do not take into account claims filed with the Custodian by individual shareholders who have intervened, under the doctrine of *Kaufman* v. *Societe Internationale, etc.*, 343 U.S. 156, in the so-called Interhandel or I.G. Chemie litigation. See, also, *Societe Internationale, etc.* v. *Rogers*, 357 U.S. 197. That case, both in its administrative and in its litigation aspects, has been administered separately from the balance of the alien property program. Doubtless, some of the individual shareholders of Interhandel may fall within the "technical enemy" category and if Interhandel, the corporate plaintiff, should ultimately be found to be enemy-tainted by virtue of affiliation with I.G. Farben of Germany, various questions might arise as to the eligibility of some of Interhandel's shareholders. We do not believe, however, that the bare possibility that the issue raised in the present petition might arise in the Interhandel litigation detracts from the conclusion, stated above, that the instant case lacks sufficient importance to warrant review by the Court at this time.

ling v. *Rogers*, 363 U.S. 666. More significant is the fact that among those whose claims are pending administratively only a handful have filed suits under Section 9(a). And, in view of the statute of limitations, only a small number would be in a position to do so now should their administrative claims be disallowed.[12]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

PAUL V. MYRON,
Acting Director, Office of Alien Property.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

ARTHUR R. SCHOR,
M. MAGDALENA SCHOCH,
Attorneys.

JUNE 1961.

---

[12] The applicable limitations provision is Section 33 of the Trading with the Enemy Act, 50 U.S.C. App. 33.

APPENDIX A

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1 *et seq.*:

Section 7(c):

If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on acount of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

Section 12:

* * * * *

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct * * *.

APPENDIX B

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY
WASHINGTON, D.C.

In the Matters of:

Docket No. 56 T 128

BANK VOOR HANDEL EN SCHEEPVART N. V.
Title Claim No. 37567

Docket No. 56 T 129

N. V. HANDELSCOMPAGNIE "RUILVERKEER"
Title Claim No. 37568

Docket No. 56 T 130

N. V. HANDELS-EN TRANSPORT-MAATSCHAPPIJ.
"VULCAAN"
Title Claim. No. 37569

Docket No. 56 T. 131

N. V. HOLLANDSCH-AMERIKAANSCHE BELEGGINGS-MAATSCHAPPY (Holland-American Investment Corp.)
Title Claim No. 42467

Docket No. 56 T 132

HANDELSVENNOOTSCHAP "NORMA" N. V.
Title Claim No. 42468

Docket No. 56 T 133

FAMILIENSTIFTUNG KASZONY
Title Claim No. 43080

Decision of Director

The claimants have filed exceptions to the Hearing Examiner's recommended decision disallowing these claims which are filed under section 32 of the Trading with the Enemy Act, as amended (50 U.S.C. App. 32), for the return of property vested by Vesting Order Nos. 248 (7 F.R. 9097, November 7, 1942); 259 (7 F.R. 10626, December 19, 1942); 261 (7 F.R. 10627, December 19, 1942); 512 (8 F.R. 1154, January 26, 1943); 5905 (11 F.R. 2097, February 28, 1946); 8471 (12 F.R. 2151, April 1, 1947, as amended: 12 F.R. 3898, June 14, 1947); 8589 (12 F.R. 2318, April 8, 1947; and 9201 (12 F.R. 4130, June 25, 1947). The recommended decision is based upon a record consisting exclusively of exhibits and a stipulation of facts.

FINDINGS OF FACT

Upon consideration of the record before the Hearing Examiner, I find that the basic facts material to a disposition of these claims are:

1. Claimants, Bank voor Handel en Scheepvart N.V. (hereinafter Bank voor Handel), N.V. Handelscompagnie "Ruilverkeer" (hereinafter Ruilverkeer), N.V. Handels-en Transport-Maatschappij "Vulcaan" (hereinafter Vulcaan) and N.V. Hollandsch-Amerikaansche Beleggings-Maatschappy or Holland-American Investment Corp. (hereinafter HAIC) are corporations organized and existing under the laws of the Kingdom of the Netherlands, and until its liquidation on July 25, 1949 claimant Handelsvennootschap "Norma" N.V. (hereinafter Norma) was a corporation organized and existing under the laws of the Kingdom of the Netherlands.

2. Claimant Familienstiftung Kaszony (hereinafter Kaszony) is a family foundation organized and existing under the laws of Switzerland.

3. The stock ownership of each claimant throughout World War II was as follows:

Heinrich Thyssen-Bornemisza, Sr. (hereinafter H.T.B. Sr.), who died in Switzerland on June 26, 1947, was the sole owner of Kaszony. Kaszony in turn owned all of the outstanding shares of HAIC.

HAIC owned all of the outstanding shares of N.V. Technische Handelsvereeniging "Dunamis" (hereinafter Dunamis), a corporation organized and existing under the laws of the Netherlands.

HAIC also owned 62½% of the outstanding shares of Norma, and Dunamis owned the remaining 37½% thereof.

Kaszony owned 52% of the outstanding shares of Algemeene Exporthandel, N.V. (hereinafter Exporthandel), and Norma owned the remaining 48% thereof. Exporthandel was a corporation organized and existing under the laws of the Netherlands.

Exporthandel owned 50% of the outstanding ordinary shares of Bank voor Handel, Norma owned 24% thereof, Kaszony owned 7¼% thereof and H.T.B. Sr. individually owned the remaining 18¾%.

Bank voor Handel owned 89% of the outstanding shares of "Vulcaan", and "Norma" owned 4.4% thereof. The remaining 6.6% were owned by H.T.B. Sr. individually.

Bank voor Handel owned all of the outstanding shares of Ruilverkeer.

4. With the exception of Kaszony, each of the claimant corporations was controlled and more than 50% of the stock of each was owned by corporations organized and existing under the laws of the Netherlands and Switzerland. The indirect ownership and

596985—61——3

control in fact of these claimants and the legal and beneficial ownership and control of Kaszony, the only Swiss claimant, were in H.T.B. Sr. until his death.

5. The claimant corporations constitute only a few of the many enterprises and companies comprising the entire Thyssen-Bornemisza group. Over the years, the various activities and enterprises of the group developed and expanded into virtually a world-wide integrated organization. By virtue of his ownership of Kaszony, H.T.B. Sr. owned and controlled the claimant organizations and through them owned and controlled a substantial number of corporations in Holland, Germany, United States, Belgium, England, and Brazil. The extent and scope of the international business activities of the Thyssen-Bornemisza group of companies can be seen from the following summary:

(a) *Bank voor Handel en Scheepvaart N.V.* (Holland)
Capital: 12,000,000 guilders
Engaged in general banking and trading business.

(b) *N.V. Handels en Transport Maatschappij "Vulcaan"* (Holland)
Capital: 5,000,000 guilders
General trading company dealing mainly in iron ores, coal, ship brokerage, and fertilizers. One of the leading companies in its field in Holland.

(c) *Handelscompagnie "Ruilverkeer" N.V.* (Holland)
Capital: 3,840,000 guilders
Non-operating holding company.

(d) *Holland-American Investment Corporation* (Holland)
Capital: 1,000,000 guilders
Investment company which acted as depositary of securities, gold, etc.

(e) *Handelsvennoopschap "Norma" N.V.* (Holland)

Capital: 50,000 guilders
Trading company (inactive since 1930).

(f) *N.V. Vulcaan's Rijnreederij* (Holland)
Capital: 50,000 guilders.
Wholly-owned subsidiary of claimant "Vulcaan".

(g) *N.V. Havenbedrijf Vlaardingen-Oost* (Holland)
Capital: 1,000,000 guilders
Owned by:
Bank voor Handel—250,000 guilders (25%)
Vulcan—750,000 guilders (75%)
Owned and operated a port and a stevedoring and ship repair business near Rotterdam. The quay, cranes and loading bridges of this company were destroyed by the Germans during the occupation of Holland.

(h) *Halcyon Lijn N.V.* (Holland)
Capital: 1,000,000 guilders
All owned by claimant Bank voor Handel.
Owns and operates fleet of ocean-going tramp steamships. At the outbreak of war in September 1939, the 12 vessels owned by Halcyon Lijn, N.V., totalling 107,000 tons, were placed at the disposal of the Netherlands government, and when Holland was occupied by Germany in 1940, ten of these vessels, which were then at sea, put into British ports under orders previously given by the Netherlands government. These ten vessels subsequently served under orders of the British Ministry of Shipping and six of them were sunk during the war.

(i) *N.V. Algemeene Brandstoffen Maatschappij Rotterdam* (Holland)
Capital 50,000 guilders
All owned by claimant Vulcaan.

(j) *N.V. Maatschappij tot Exploitatie van Onroerende Goederen "De Blaak"* (Holland)
Capital: 40,000 guilders
All owned by claimant Bank voor Handel.
Non-operating holding company.

(k) *Hollandsch Trustkantoor N.V.* (Holland)
Capital: 10,000 guilders
Owned by: Administrative services: administering assets, acting as depositary, etc.

(l) *Rotterdamsch Trustee's Kantoor N.V.* (Holland)
Capital: 100,000 guilders
Owned by claimant Bank voor Handel—50,000 guilders (50%)
Owned by "De Blaak"—50,000 guilders (50%)
Administrative services: Administering assets, acting as depositary, keeping accounting records, etc.

(m) *N.V. "Gerfa" Gereedschappenfabriek* (Holland)
Capital: 300,000 guilders
Owned by claimant Vulcaan.
Manufacturing and trading in machine equipment, and ship repairs.

(n) *N.V. Technische Handelsvereeniging "Dunamis"* (Holland)
Capital: 100,000 guilders
Owned by claimant H.A.I.C.
Trading and development corporation (inactive since 1930).

(o) *Algemeene Exporthandel N.V.* (Holland)
Capital: 25,000 guilders
Owned by:
Kaszony—13,000 guilders (52%)
Norma—12,000 guilders (48%)
Trading corporation (inactive since 1930).

(p) *N.V. Vulcaan Kolen Maatschappij* (Holland)

Capital: 500,000 guilders
Owned by:
Thyssen Bornemisza, Sr.—300,000 guilders
Norma—200,000 guilders

(q) *"Veemex" Maatschappij voor Veembedrijf en Expedite N.V.* (Holland)
Capital: 20,000 guilders
Coal trading company.
Wholly-owned subsidiary of Vulcaan.
Port activities.

(r) *Holland American Trading Corporation* (N.Y.)
Capital: $50,000
Owned by claimant Bank voor Handel.
General trading corporation.

(s) *Seamless Steel Equipment Corporation* (N.Y.)
Capital: $50,000
Owned: 50% by claimant Bank voor Handel.
Sales and distribution of seamless tubes and pipes.

(t) *Union Banking Corporation* (N.Y.)
Capital: $400,000
Owned by claimant "Ruilverkeer".
New York banking corporation.

(u) *Domestic Fuel Corporation* (N.Y.)
Capital: $50,000
Owned:
25% by claimant Vulcaan
25% by Holland American Trading Corporation
Importing and sale of coal in United States and Canada.

(v) *Companhia Thyssen do Brasil S.A.* (Brazil)
Capital: 1,500,000 cruzeiros
Owned:
50% by claimant Bank voor Handel
50% by claimant Vulcaan
Ownership of real estate in Brazil.

(w) *Ghent Coal Company S.A.* (Belgium)
Capital: 300,000 francs
Owned by claimant Vulcaan.
Coal wholesaler in Belgium.

(x) *Vulcaan Commerciale & Maritime S.A.* (Belgium)
Capital: 2,700,000 francs
Owned by claimant Vulcaan.
Coal wholesaler in Belgium.

(y) *Vulcaan (London) Ltd.* (England)
Capital: £5,000
Owned by claimant Vulcaan.
Coal wholesaler in England.

(z) *Vulcaan Bunkering Company S.A.* (Belgium)
Capital: 250,000 francs
Owned by claimant Vulcaan.
Coal sales and bunkering.

(aa) *Rittergut Ruedersdorf G.m.b.H., Hennickendorf* (Germany)
Capital: 600,000 Reichmarks
The entire capital of this corporation was owned by Bank voor Handel (Claimant in 37567). The corporation was engaged in the manufacture of cement and bricks.

(bb) *Press-und Walzwerk A.G.* (Germany)
Capital: 22.760.000 Reichmarks
Of the capital of this corporation 63.11% was owned by Kaszony (Claimant in 43080), 17.575% by Bank voor Handel (Claimant in 37567) and the remaining 19.315% by Rittergut Ruedersdorf G.m.b.H., which, as shown above, was wholly owned by Bank voor Handel. The corporation manufactured iron and steel products. During the war its output was compelled by German authorities to go into the manufacture of submarines, aircraft, ammunition, rolling stock, and was used for needs of the Four-Year Plan.

(cc) *A. G. Oberbilker Stahlwerk* (Germany)
Capital: 1,500,000 Reichmarks
Of the capital of this corporation 99.67% was owned by Press-und-Walzwerk A.G. (above under bb), whereas the remaining .33% was owned by Bank voor Handel. The nature of the business of the corporation was the same as that of Press-und-Walzwerk A.G.

(dd) *Thyssensche Gas-und Wasserwerke G.mb.H.* (Germany)
Capital: 35,000,000 Reichmarks
60% of the capital of this corporation was owned by Kaszony (Claimant in 43080); the remaining 40% was owned by Bank voor Handel (Claimant in 37567). The Corporation was one of the principal gas and water suppliers of the Ruhr area. During the war its annual output amounted to one billion cubic meters of gas and 100 million cubic meters of water. It also produced more than 6,000 tons of sulphur annually, thus taking second place among the sulphur producers of the Ruhr area.

(ee) *Niederrheinische Gas-und Wasserwerk G.m.b.H.* (Germany)
Capital: 700,000 Reichmarks
This corporation, a wholly owned subsidiary of Thyssensche Gas-und Wasserwerke G.m.b.H. (above under (dd), was a local supplier of gas and water.

(ff) *Gewerkschaft Walsum* (Germany)
99% of the capital of this corporation was owned by Thyssensche Gas-und Wasserwerke G.m.b.H. (above under (dd), and the remaining 1% by Niederrheinsche Gas-und Wasserwerke G.m.b.H. (above under (ee)). The corporation operated a coal mine with an annual output of one million tons.

(gg) *Seismos G.m.b.H.* (Germany)
Capital: 128,000 Reichmarks
This corporation was wholly owned by Thyssensche Gas-und Wasserwerke G.m.b.H. (above under (dd)). It was engaged in geophysical research in connection with the development of oil resources in Germany and in the occupied territories. In view of its paramount importance to the German war effort it enjoyed the special privileges granted enterprises of its kind by order of the Chairman of the Council of Ministers for the Defense of the Reich and Commissioner for the Four-Year Plan.

(hh) *Flensburger Schiffsbaugesellschaft* (Germany)
Capital: 2,640,000 Reichmarks
Of the capital of this corporation 31.023% was owned by Bank voor Handel (Claimant in 37567), and 28.545% by Vulcaan (Claimant in 37569); 25% by the City of Flensburg and the remaining 14% by unidentified individual Germans. Before World War II, the Company was engaged in building merchant ships but in 1940 it was compelled by the German authorities to begin the construction of submarines. The Company delivered a substantial number of submarines, at least 28. In 1942 88.7% of the total output of the Company consisted of war production.

(ii) *Deutsch-Niederlaendische Schiffahrts-und Handels, G.m.b.H.* (Germany)
Capital: 100,000 Reichmarks
80% of the capital of this corporation was owned by Vulcaan (Claimant in 37569) and the remaining 20% by Halcyon Lijn N.V. Rotterdam, a wholly owned subsidiary of Bank voor Handel (Claimant in 37567). The corporation

served the Rhine River shipping needs of the combine.

(jj) *August-Thyssen Bank A.G.* (Germany)
Capital: 16,000,000 Reichmarks
Of the capital of this corporation Kaszony (Claimant in 43080) owned 25%, Press-und Walzwerk A.G. (above under (bb) another 55%, and Ruilverkeer (Claimant in 37568) the remaining 20%. The bank was the financing institution of the enterprises constituting H.T.B. Sr.'s German combine.

(kk) *Bremer Vulkan Schiffbau-und Maschinenfabrik* (Germany)
Capital: 10,000,000 Reichmarks
August Thyssen-Bank A.G. (above under (jj) owned 29.6% of the capital of this corporation, another 29.6% was owned by Press-und Walzwerk A.G. (above under (bb)), 25% was owned by Vulcaan (Claimant in 37569) and 2.21% by Bank voor Handel (Claimant in 37567); the ownership of the remaining 13.59% has not been accounted for. This corporation was engaged in ship building, mainly for the merchant marine. During the war, however, it was compelled to build 74 submarines, which it did.

(ll) *Zucht & Rennetrieb Erlenhof, G.m.b.H.* (Germany)
Capital: 850,000 Reichmarks
Of the capital of this corporation 54.706% was owned by Vereinigte Berliner Moertelwerke, a subsidiary of Rittergut Ruedersdorf, G.m.b.H. (above under (aa)), 29.412% was owned directly by H.T.B. Sr. and 15.882% was owned by Hollandsche Trust Kantor, N. V., Rotterdam. This company was engaged in the breeding of race horses, which was one of the principal hobbies of H.T.B. Sr.

6. During the years 1940 to 1947 H.T.B. Sr. was not an officer or director of any of the corporations in Holland.

7. From 1932 on, H.T.B. Sr. held the position of Chairman of the Supervisory Board of Press-und Walzwerk A.G. and of Oberbilker Stahlwerk Duesseldorf, and Deputy Chairman of Bremer Vulkan Schiffbau-und Maschinenfabrik.

8. H.T.B. Sr. personally attended no more than two meetings of the boards of the German corporations prior to 1939. During World War II he attended no meetings of these boards, nor did he personally perform any functions as a member thereof. He was credited with Reichmarks 25,000 for the years 1941, 1942 and 1943, respectively, for compensation as a member of the supervisory board of a German corporation. This sum was remitted to August-Thyssen Bank, Berlin, and credited to H.T.B. Sr.'s blocked account. For the years 1944 to 1947 DM 5,000 were paid on January 31, 1952 to the Community of Heirs for H.T.B. Sr. and remitted to Banking House Trinkhaus, Dusseldorf.

9. Although H.T.B. Sr. was a member of the management of Gewerkschaft Walsum, the business of the company was actually conducted by a special representative of Thyssensche Gas-und Wasserwerke G.m.b.H., which held 99% of the capital stock of Walsum. H.T.B. Sr. received no compensation as a member of the management of this enterprise.

10. In May 1940, when Holland was occupied by the armed forces of Nazi Germany, H.T.B. Sr., residing in Switzerland, was cut off from all communication with the managers of his Netherlands companies.

11. Dr. Wilhelm Roelen, a citizen and resident of Germany, was a Managing Director of Thyssensche

Gas-und Wasserwerke G.m.b.H. (hereinafter Thyssen Gas), one of the larger Germany companies of H.T.B. Sr. As such he was also the special representative of the management of Gewerkschaft Walsum. When Rotterdam was occupied by the German Army and the records of Bank voor Handel were subject to investigation by the German tax and exchange authorities, Roelen became concerned because of the confiscation of the properties of Fritz Thyssen, H.T.B. Sr.'s brother, and because of certain past transactions between Bank voor Handel and Thyssen Gas.

12. Upon his own initiative, Roelen went to Switzerland in July 1940 in an attempt to protect the interests of H.T.B. Sr. wherever he could.

13. On July 9, 1940, H.T.B. Sr. by a general power of attorney appointed Roelen to represent him in every place, including negotiations and transactions with government agencies, and in all respects to act in his behalf.

14. Exercising the powers conferred on him by H.T.B. Sr., the attorney in fact took over the management of H.T.B. Sr.'s enterprises from the Dutch managers, assuming full charge of and responsibility for the management of the Netherlands corporations and the German corporations whose stock was owned by the Netherlands corporations. This change in management resulted in 1942 in the removal of H. J. Kouwenhoven as the senior managing director of Bank voor Handel. He was a Dutch citizen and resident on whom H.T.B. Sr. had theretofore relied, not only for the management of his enterprises in the Netherlands, Germany, and elsewhere, but also for the management of his personal financial affairs.

15. In the period between July 1940 and the end of 1944, the attorney in fact visited H.T.B. Sr. in Switzerland about three times a year to report to him

"the status of his companies in Germany and Holland". On a few occasions he was accompanied by Heinrich Lubke, managing director of August-Thyssen Bank, Berlin.

16. H.T.B. Sr. was born in Muelheim-ruhr, Germany, on October 31, 1875. At the age of approximately 25 he left Germany and went to England, where he remained until 1906 when he married Margit Bornemisza, a national of Hungary. Towards the end of 1906 he moved to Hungary and was adopted by his father-in-law, the Hungarian citizen Gabriel Bornemisza. Pursuant to H.B.T. Sr.'s application and in conformity with Article L [50] of the Law of 1879, he was accepted as a citizen of Hungary and took the oath of Hungarian citizenship on December 9, 1906. He retained Hungarian citizenship until his death in June 1947 and was in possession of Hungarian passport No. 438/206 142 (last extended by the Hungarian Legation in Berne, January 18, 1947) on May 31, 1947. Although he acquired Hungarian citizenship in 1906, the German Passport Office in Vienna issued to H.T.B. Sr. German Passport No. 2136, dated April 17, 1919, which was valid for only three months. A letter signed by Davidsen by order of the Foreign Minister of the Reich dated Berlin. 21 October 1942, states that German passport No. 262623 issued to the Baron "at the Hague and prolonged until 5-2-26."

17. Between 1906 and 1919 H.T.B. Sr. lived in Hungary supervising the management of a farm which his father had given him.

18. In 1919 when he was 44 years old the Communist uprisings in the area of Hungary where his farm was located posed threats to the safety of himself and family and resulted in his removal to the Netherlands where he became associated for the first

time with the Thyssen enterprises. He resided in the Netherlands until 1932.

19. Between the autumn of 1919 and the summer of 1921 August Thyssen, Sr., transferred to his two sons, H.T.B. Sr. and Fritz Thyssen, all of his 75% interest in the various Thyssen enterprises. The remaining 25% was then owned by Hans Thyssen and Julius Thyssen, who were cousins of H.T.B. Sr. and his brother.

20. With the ownership of the Thyssen industries in the hands of the sons of the original found[er], the prior pattern of joint ownership and control of the various enterprises as a unit began to dissolve. At first the two brothers informally divided the supervision over their various companies between themselves. Eventually, negotiations were undertaken which led to the division of ownership in the jointly owned properties, so that H.T.B. Sr. became the owner of certain of the enterprises outright, rather than the owner of an undivided interest in all the enterprises.

21. The negotiations for a division of the various properties received from August Thyssen, Sr. extended over a period of almost thirteen years, from 1923 to 1936. In broad terms, the result of the division painstakingly worked out, was that Fritz, Hans and Julius Thyssen became the joint outright owners of certain of the enterprises located in Germany and consisting primarily of steel works, coal mines and cokeries, and H.T.B. Sr. became the sole owner of a group of Netherlands corporations consisting of the Bank voor Handel, a coal and iron ore transportation and trading company, port facilities at Rotterdam and an ocean-going steamship company. These Netherlands companies owned a large proportion of the shares of stock of several German corporations, the

remaining shares of which were acquired outright by H.T.B. Sr. He thus also became the sole ultimate owner and person in control of a number of German non-steel-producing companies which consisted of utilities, coal concessions, ship-building facilities, a seamless tube factory and cement works. The only assets in which a common ownership by Fritz Thyssen and H.T.B. Sr. remained after 1936 were the August Thyssen-Bank in Berlin and a number of undeveloped coal concessions.

22. From the very beginning of his association with his father's business in 1919, H.T.B. Sr. relied upon the extremely well qualified executives in his employ for the management of his enterprices. Chief among these trusted and confidential employees in Rotterdam was Mr. H. J. Kouwenhoven, the senior managing director of Bank voor Handel, who represented H.T.B. Sr. in the initial negotiations on the division of the properties of August Thyssen, Sr.

23. While H.T.B. Sr. resided in The Hague, the amount of time he devoted to the affairs of the various companies was slight and his interest in other pursuits increased. It was during his residence in the Netherlands that H.T.B. Sr. became interested in social activities, extensive traveling, the breeding and racing of thoroughbred horses, and the acquiring of objects of art, his collection of which, at the time of his death, was one of the world's most outstanding.

24. In 1932 H.T.B. Sr. divorced his first wife and married a woman considerably younger than himself. During the same year he purchased a substantial home in Castagnola-Lugano, Switzerland, where he and his new spouse settled to live. From 1901 until his death in 1947 H.T.B. Sr. never resided in Germany.

25. H.T.B. Sr. did not reside within the territory of Germany, Japan, Bulgaria, Hungary or Rumania

at any time subsequent to December 7, 1941. From April 1932 until his death on June 26, 1947 he resided at Castagnola-Lugano, Switzerland.

26. Between December 7, 1941 and March 8, 1946 H.T.B. Sr. was never present in the territory of Germany, Japan, Bulgaria, Hungary or Rumania, or in any territory occupied by the military or naval forces thereof.

27. When the war commenced in 1939 H.T.B. Sr. was 64 years of age. In the same year he was diagnosed as a diabetic. During that year marital difficulties with his third wife resulted in his living apart from her.

28. Because of H.T.B. Sr.'s refusal to follow medical advice and the persistent and excessive use of alcoholic beverages, his diabetic condition grew worse. Following the year 1939 he was seriously affected with arteriosclerosis and his physical and mental condition deteriorated. His health continually worsened following two diabetic comas or apopletic strokes in 1943 and he required almost constant medical care thereafter. By 1946 he was in a state of mental and physical exhaustion which continued without improvement until the time of his death in 1947.

29. Following the liberation of Holland from occupation by the Nazis, temporary administrators were appointed by the Netherlands Government to manage the Netherlands corporations of H.T.B. Sr. pending investigations of their conduct and ownership. These supervisory administrators were subsequently removed after the investigations were made, and no penalties, seizures or censure were imposed on the corporations.

30. Following the death of H.T.B. Sr on June 26, 1947, the assets of his estate were divided among his four children in the following proportions:

Hans Heinrich Thyssen-Bornemisza, Jr.	5/8
Stephan Thyssen-Bornemisza	1/8
Margit Thyssen-Bornemisza Batthyany	1/8
Gabrielle Thyssen-Bornemisza Bentinck	1/8

This was pursuant to a general settlement of the estate entered into by the four children and the widow of H.T.B. Sr. and confirmed by an Arbitration Tribunal under Swiss law.

31. After the death of H.T.B. Sr. the majority stock ownership and control of Bank voor Handel and Kaszony passed to his principal heir, Hans Heinrich Thyssen-Bornemisza, Jr.

32. Thyssen-Bornemisza, Jr. was born in The Hague, the Netherlands on April 13, 1921 and was born a Hungarian national by virtue of the Hungarian citizenship of his parents at that time.

33. Thyssen-Bornemisza, Jr. resided in The Hague from his birth until November 1939, when his parents brought him to Switzerland. He has been residing in Switzerland since that date.

34. Between 1940 and 1944 he attended Fribourg University in Switzerland. In 1944 he took up residence with his father at Castagnola-Lugano and he has resided there ever since.

35. In May 1942, when Thyssen-Bornemisza, Jr. was still a student at Fribourg University and was 21 years old, at the insistence of Dr. Roelen he visited his family's ancestral estate at Schloss-Landsberg in Germany to attend commemoration ceremonies marking the 100th anniversary of the birth of his grandfather, August Thyssen, Sr., who was buried at Schloss-Landsberg.

36. The visit of Thyssen-Bornemisza, Jr. to Germany lasted only five days and after attending the commemorative exercises he visited his father's stable and stud farm located near Frankfurt. His sister,

Margit Thyssen-Bornemisza Batthyany, who was an Austrian national residing in Austria, also attended the ceremonies and visited the stables.

37. During the period from December 7, 1941, to March 8, 1946, Thyssen-Bornemisza, Jr., did not engage in any business within the territory of Germany, Japan, Hungary, Bulgaria or Rumania or within any territory occupied by the military or naval forces thereof, and the only time he was present in such territory during that period was during the five days in May 1942, mentioned above.

OPINION AND CONCLUSIONS

The parties have stipulated that the sole issues material to the determination of this claim are whether the claimants are ineligible under various provisions of section 32 of the Trading with the Enemy Act, as amended (50 U.S.C. App. 32). Claimants do not contend in this proceeding that they are eligible under section 9. The primary issue presented by the parties is whether claimants are ineligible by virtue of subdivision (E) of subsection 32(a)(2). Under that subdivision

> a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 percentum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) [of section 32(a)(2)],

is ineligible. Under subdivision (D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, is ineligible for return if at any time after December 7, 1941, and prior to March 8, 1946, he was

> present * * * in the territory of such nation or in any territory occupied by the military

or naval forces thereof or engaged in any business in any such territory.

It is contended by the claimant corporations that, with the exception of Kaszony, each of them was controlled and all of its stock was owned by corporations organized under the laws of The Netherlands or Switzerland; that none of these claimants is ineligible under subdivision (A), (B), (C), or (D) of section 32(a)(2); and the provisions of subdivision (E) of section 32(a)(2) do not render any of the claimants ineligible for the return of the claimed property since subdivision (E) does not permit inquiry into the question whether the corporations owning or controlling the claimants were themselves owned or controlled by a person ineligible under subdivision (A), (B), (C), or (D). In support of this proposition, claimants cite my decision in *Matter of International Telephone and Telegraph Corporation*, Cl. Nos. 6211 and 6212, January 18, 1955. That matter was decided under the first proviso of subdivision (B) of section 32(a)(2) which authorizes return to the American stockholders of any enemy corporation whose property was vested if such American stockholders owned 100 percent of the stock of the enemy corporation. I ruled that ownership by American nationals of all of the stock of a German corporation which in turn owned all of the stock of a second German corporation whose property was vested did not bring the American nationals within the terms of the first proviso of subdivision (B). But that decision is not applicable to the issue raised by the claimants herein. The phrasing of subdivision (E), "controlled by or 50 per centum or more of the stock of which was owned by", is in the disjunctive. It is clear that subdivision (E) is not concerned with ownership alone as is (B); it also includes the test of actual control.

It is significant that in litigation arising under the Trading with the Enemy Act, as amended, the courts have ruled that the neutral nationality of a corporate claimant is not necessarily conclusive of that claimant's alleged non-enemy status. It has been held that the true character of the interests composing the corporation may be investigated, *Societe Internationale Pour Participations Industrilles et Commerciales, S.A.* v. *McGranery,* 111 F. Supp. 435 (D.C. Dist. of Col., 1953), modified on other grounds, 225 F. 2d 532, cert. den. 350 U.S. 937, and that return will be denied if the corporation is enemy-controlled *Clarke* v. *Uebersee Finanz-Korp.,* 332 U.S. 480 (1947); *Uebersee Finanz-Korporation, A.G.* v. *McGrath,* 343 U.S. 205 (1952); *Swiss International Insurance Co.* v. *Crowley,* 136 F. 2d 265 (C.A., D.C., 1943). In other contexts, it has been decided that the owner of the majority of the stock of one corporation has control of another corporation in which the first corporation has a majority stock interest. *United States* v. *Marshall Transport Co.,* 322 U.S. 31 (1944); *Universal Carloading & Distributing Co.* v. *Railroad Retirement Board,* 71 F. Supp. 369 (D.C., Dist. of Col., 1947); *Madison Pictures* v. *Chesapeake Industries,* 147 N.Y. S. 2d 50 (N.Y. Sup. Ct., 1955). Similarly, the term "controlled", as used in subdivision (E), is not to be limited in its scope to the controls derived solely from direct stock ownership. Neither the language nor the legislative history of the subdivision suggests such a limitation.

In all, I find no basis for concluding that subdivision (E) was intended to prevent the return of vested property to a foreign corporation or association only when it was directly controlled by a person ineligible under subdivision (A), (B), (C), or (D) and to require a return where control by such person was indirect.

H.T.B. Sr.

I now turn to the question of the actual control of claimants within the meaning of subdivision (E). H.T.B. Sr. was the direct owner of all the stock of the claimant Kaszony and the indirect owner of all of the stock of the other claimants. He actually exercised complete dominion over all of the claimants in 1940 by granting to Roelen, a German citizen, his power of attorney, pursuant to which Roelen undertook active management of all the Netherlands claimants and all the German companies owned by these Neterlands claimants. Rolen removed the senior managing director of claimant Bank voor Handel, H. J. Kouwenhoven, a citizen and resident of The Netherlands, on whom H.T.B. Sr. had theretofore relied for the management of his enterprises in The Netherlands, Germany and elsewhere, and who had also managed his personal affairs. H.T.B. Sr. was fully informed of Roelen's actions and did not interfere in any way. The control thus exercised over the Netherlands claimants Roelen pursuant to his power of attorney is attributed to his principal, H.T.B. Sr., *Uebersee Finanz-Korporation, A.G.* v. *Brownell,* 133 F. Supp. 615, 620 (D.C., Dist of Col., 1955), affd. 244 F. 2d 789, cert. den. 355 U.S. 878, and hence the latter not only had the power to control but, through his agent, actually exercised control. It might be noted in passing that a contrary view would avail the claimants nothing under subdivision (E) since it would require the conclusion that they were controlled by Roelen, a citizen and resident of Germany who is clearly ineligible under subdivision (D).

Inasmuch as all of the stock of the claimant Kaszony was owned by H.T.B. Sr. and all of the other claimants were "controlled" by him, each of the claimants is ineligible under subdivision (E) if

H.T.B. Sr. failed to meet the eligibility requirements of subdivision (D). Since he was an Hungarian citizen who was not at any time between December 7, 1941, and March 8, 1946, present in the territory of an enemy nation or in territory occupied by an enemy nation, the test of his eligibility under subdivision (D) is whether he was engaged in business in any such territory during the prescribed period.

Claimants urge that H.T.B. Sr. was nothing more than the ultimate owner of the various corporations which comprised his industrial network and that this ownership did not constitute doing business. The argument is also made that the power of attorney granted by H.T.B. Sr. to Roelen could be used only to exercise the rights of H.T.B. Sr. as stockholder, since that was the latter's only relationship with these corporations. Roelen, it is contended, did not engage in any personal business activities of H.T.B. Sr. and did nothing more than protect the latter's interests as stockholder in these corporations. The change in management effected by Roelen is said to be of no legal significance because the managing directors did not derive their authority from H.T.B. Sr. or Roelen, but rather from the offices which they held.

These arguments are at variance with the stipulated facts that in the exercise of the powers conferred upon him by H.T.B. Sr., Roelen took over the management of and assumed "full charge of and responsibility for" the German and Netherlands enterprises. In an affidavit of May 16, 1950, Roelen stated that "with this power of attorney in my possession I returned to Germany from Holland and proceeded to manage and operate the enterprises of Thyssen-Bornemisza and continued to do so until the end of the war." In an affidavit dated June 5, 1950, Roelen stated that in dismissing Kouwenhoven as a member of the Board of

Directors and as a member of the Supervisory Board of a number of H.T.B. Sr.'s Dutch corporations, he "had no alternative but to use [his] position as general attorney-in-fact" of H.T.B. Sr. Furthermore, that H.T.B. Sr. was fully aware of Roelen's activities and presumably approved them is shown by the fact that Roelen visited H.T.B. two or three times a year to report to him the status of the German and Dutch corporations.

It is thus clear that Roelen regarded H.T.B. Sr., as his source of authority, that it was the power of attorney from H.T.B. Sr. which enabled him to manage the affairs of the corporations in Germany and Holland and that he felt himself accountable to H.T.B. Sr. for his activities. Even if, as contended by claimants, it was his purpose, as well as that of H.T.B. Sr. to preserve the property interests of the latter in Germany and Holland, Roelen's activities unquestionably constituted doing business in Germany and in enemy-occupied Holland. And, since Roelen undertook these acts pursuant to the power of attorney from H.T.B. Sr. and for his benefit, the conclusion is inescapable that H.T.B. Sr., himself, through his authorized agent, was engaged in business in these countries. See *Uebersee Finanz Korporation, A. G.* v. *Brownell, supra.* Although that case was a suit for return under section 9 of the Act and the issue was whether the plaintiff was "doing business" in enemy territory within the meaning of section 2, I perceive no difference between the "doing business" in enemy territory referred to in section 2 and the "engaged in any business" in enemy territory referred to in section 32(a)(2)(D).

It follows that H.T.B. Sr. was ineligible under subdivision (D) of section 32(a)(2) of the Act, and since he owned all of the stock of Kaszony and con-

trolled the other claimant corporations, each of the claimants is ineligible for return under subdivision (E).

Hungarian Peace Treaty

An additional issue raised by claimants relate to the effect of the 1947 Treaty of Peace with Hungary. They contend that the rights of H.T.B. Sr. and H.T.B. Jr., both of them citizens of Hungary, must be considered in the light of Article 29 of that Treaty, the pertinent portion of which is as follows:

> 1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.
>
> 2. The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned. The Hungarian owner shall have no rights with respect to such property except those which may be given him by that law.
>
> 3. The Hungarian Government undertakes to compensate Hungarian nationals whose property is taken under this Article and not returned to them.

Claimants assert that under this language the United States may retain only vested property which had been owned or belonged to Hungarian nationals: that

H.T.B. Sr. and H.T.B. Jr. merely owned interests in each of the claimants, and were not the prevesting owners of the property sought therein; and that since the terms of Article 29 permit the retention only of properties "belonging" to Hungarian nationals (and not to Swiss and Dutch nationals), it follows that the properties claimed herein must be returned.

There is no doubt that Article 29 deals exclusively with Hungarian property. However, to argue that for this reason the Treaty requires the return of non-Hungarian property is a non-sequitur. It is significant that the property which the claimants seek to recover was vested pursuant to the Trading with the Enemy Act, as amended, and that the second sentence of section 2 of Article 29 recognizes that even the rights of Hungary and its nationals to recover vested property are governed by that Act.

In view of the foregoing it is not necessary to decide the additional issues stipulated by the parties which relate to the eligibility or ineligibility of H.T.B. Jr.

Accordingly, Title Claims Nos. 37567, 37568, 37569, 42467, 42468, and 43080 are disallowed.

(Signed) Dallas S. Townsend,
DALLAS S. TOWNSEND,
Assistant Attorney General,
Director, Office of Alien Property.

FEBRUARY 13, 1959.

Supreme Court of the United States

OCTOBER TERM, 1960

REPLY BRIEF FOR PETITIONERS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 958

BANK VOOR HANDEL EN SCHEEPVAART, N.V., *et al.*,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

Although respondents characterize (brief, p. 9) the issue here involved as "residual" and of no "substantial importance" because the World War II vesting program is twenty years old, the fact remains that the Trading With the Enemy Act is permanent legislation presently applicable in various parts of the world and continuously available for international emergencies. Determination of the issue by this Court is important for guidance in the continuing administration of the Act.

1. The issue is admittedly one of "first impression" (Resp. brief, p. 9), and is not controlled by *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42 (Resp. brief, p. 6) which held, *inter alia*, that the termination of war does not auto-

matically entitle a corporation, concededly enemy by reason of its activities, to a return of vested property. The view that enemy status attributable solely to enemy occupation should disappear with the cessation of occupation is rejected by respondents (brief, p. 6) as a "shifting construction"; but petitioners' position is thoroughly consistent with the flexible interpretation of the statute approved by this Court when it held in *Clark* v. *Uebersee Finance Korporation*, 332 U. S. 480, that § 2 of the Act should be applied differently after the enactment of § 5(b) in 1941, in order to achieve a remedial result.

2. The committee report quoted on page 7 of respondents' brief embodying the language that "present law does not permit a return of the property of even these technical 'enemies'" does not say a word about § 9(a) or a judicial remedy, and refers, in its context, to matters involving administrative return.[1]

3. Although respondents refer to possible remedy in the Court of Claims (brief, pp. 4, 8), Congress has demonstrated its intent that claimants to vested property should not be relegated to a Court of Claims forum. Not only does the Act itself contain a "sole relief and remedy" provision (§ 7(c)), but at least twice since the end of World War II Congress has considered and rejected proposed legislation[2] in 1945 and 1946 which would substitute

1. Since there is no right to judicial review of the administrative determination of the Alien Property Custodian in our case (*Schilling* v. *Rogers*, 363 U. S. 666), this Court is hardly the place to protest the lack of "rational basis" for that determination, as respondents seem to think should be done (brief, p. 7).

2. H. R. 4840 (78th Cong. 2d Sess.) and H. R. 5084 (79th Cong. 1st Sess.). In explaining its own amendment to H. R. 5084 the Senate Committee on the Judiciary stated: "The bill as herein amended preserves in full these rights under 9(a) which the former foreign national, together with the United States citizen, has had for more than 25 years under the act." (Senate Rep. 1839, Committee on the Judiciary, 79th Cong. 2d Sess., 1946, p. 2.)

a Court of Claims remedy, for that provided by 70(a). In *Clark v. Uebersee Finanz-Korporation*, 332 F. S. 480, 487, this Court said "It is not easy for us to assume that Congress treated all nonenemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment."

Petitioners urge that this Court grant certiorari to settle an issue vital to protection of alien assets in the United States and to proper administration of alien property legislation.

Respectfully submitted.

ROBERT L. ASCHENBRUCK,
500 Fifth Avenue,
New York 36, N. Y.

LAWRENCE C. MOORE,
Mills Building,
Washington 6, D.C.,

Attorneys for Petitioners.

June 1961.